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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ALMA RUSSELL,

Petitioner,

v.

JAMES O'GRADY, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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October, 1990

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QUESTION PRESENTED FOR REVIEW

Did the Trial Court deny the Plaintiff her right to due process in accordance with the Fourteenth Amendment to the United States Constitution when it denied Plaintiff's Motion to Vacate Dismissal for Want of Prosecution?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED FOR REVIEW ...	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT:	
THE TRIAL COURT DENIED THE PETITIONER HER RIGHTS TO DUE PROCESS IN ACCORDANCE WITH THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN IT DENIED THE PLAINTIFF'S MOTION TO VACATE DISMISSAL FOR WANT OF PROSECUTION ..	3
CONCLUSION	8
APPENDIX:	
Judgment and Order of the United States Court of Appeals for the Seventh Circuit, July 27, 1990	App. 1

TABLE OF AUTHORITIES

Cases	PAGE
Beshear v. Weinzapfel, 474 F.2d 127	7
Boazman v. Economics Laboratory, Inc., 537 F.2d 210	6, 7
Dungin v. Graham, 372 F.2d 130	6
Ellingsworth v. Chrysler, 655 F.2d 180	6
Stevens v. Greyhound Lines, 710 F.2d 1224	7
Constitutional Provision	
U.S. Constitution, Fourteenth Amendment	2

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, ALMA RUSSELL, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals entered in this case on July 27, 1990 and the denial of her Petition for Leave to Appeal.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reprinted in the Appendix to this Petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on July 27, 1990. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

On August 18, 1988, the Petitioner, represented by attorney VINCENT WAGNER, filed her Complaint pursuant to Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1871 and the Age and Discrimination in Employment Act. From August 18, 1986 to June of 1987, Petitioner was given leave and did file three subsequent Amended Complaints. Pre-trial conferences were held on June 2, 1987 and November 24, 1987. On November 2, 1987, VINCENT WAGNER filed his Motion to Withdraw as attorney for the Petitioner. On November 24, 1987, T. LEE BOYD, JR. & ASSOCIATES filed his Appearance on behalf of the Petitioner.

On August 4, 1986, the Trial Court entered an Order dismissing the Petitioner's lawsuit for want of prosecution.

On September 28, 1988, the Petitioner filed her Motion to Vacate the August 4, 1988 Dismissal for Want of Prosecution Order with accompanying Affidavits. Said Motion was denied.

On January 11, 1989, Petitioner's attorney again filed a Motion to Vacate Dismissal for Want of Prosecution and to file the Pre-trial Order *instanter*. On February 1, 1989, Petitioner's Motion was again denied.

On February 24, 1989, the Petitioner filed her Motion to Reconsider the Court's Order of February 1, 1989 denying the Plaintiff's Motion to Vacate the Dismissal for Want of Prosecution. Said Motion was denied.

Notice of Appeal to the Seventh Circuit Court of Appeals was filed. On July 27, 1990, the Seventh Circuit affirmed the ruling by the Trial Court.

REASONS FOR GRANTING THE WRIT

THE TRIAL COURT DENIED THE PETITIONER HER RIGHTS TO DUE PROCESS IN ACCORDANCE WITH THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN IT DENIED THE PLAINTIFF'S MOTION TO VACATE DISMISSAL FOR WANT OF PROSECUTION.

On August 4, 1988, the Trial Court in the instant matter dismissed the lawsuit filed by the Petitioner, ALMA RUSSELL, for want of prosecution. In its Order, the Trial Court stated:

> "Plaintiff's attorney fails to appear. Plaintiff has failed to submit Fourth Amended Complaint as he represented to the Court at the status hearing on June

> 24, 1988. Parties have failed to prepare a final Pre-Trial Order, as directed by the Court on June 24, 1988. Plaintiff also has failed to appear at the last two hearings before Magistrate Weisberg. The cause is therefore dismissed for want of prosecution."

The Petitioner then filed her Motion to Vacate the Order of August 4, 1988. In said Motion, the Petitioner included Affidavits of her trial lawyer and his associate. These Affidavits indicated: (1) that Petitioner's attorney had not been advised by anyone that the matter had been assigned to the Magistrate; (2) nor had he been advised of the scheduled Court dates; (3) on August 4, 1988, Petitioner's attorney was engaged before a State Court Judge on a criminal matter; and (4) that because he was engaged, he sent his associate to the Pre-Trial Conference. Petitioner's Motion to Vacate was denied with the Trial Court stating in pertinent part that:

> "A Motion to Vacate Dismissal Order shall not be considered unless Plaintiff first presents the Pre-Trial Order as directed by the Court three months ago."

Subsequent thereto, the Petitioner prepared the final Pre-Trial Order and filed her Motion to Vacate the Dismissal and to allow the Plaintiff to file the Final Pre-Trial Order, *instanter*. In the Plaintiff's second Motion, the Petitioner's attorney indicated that although he had filed his appearance on behalf of the Petitioner, he never received Notices of the dates before the Magistrate and did not receive a copy of the Minute Order indicating that the Final Pre-Trial Order was due to be filed on August 4, 1988. Further, on January 23, 1989, before Judge Conlon, the attorney for the Petitioner stated in part as follows:

> "Mr. Boyd: Well, the one thing—I've spoken to Mr. Greenberg about this, Judge. This case when I got it—I was not the first lawyer

in the case, and when I got this file, Judge, it was just like going through mud. I mean it was terrible. The file was just all messed up. And I did want to file an amended complaint. But, Judge, I went back through it and I just didn't feel as though it could be amended. It's hard for me to even articulate, Judge, how poorly done it was. And, Judge, I didn't know anything about the Magistrate because I never got Orders. I did file my appearance with the Clerk's Office downstairs. I eventually found out that what they had been doing was they were sending the notifications to the prior lawyer. And he was not responding to them. So, Judge, I was kind of walking around in the dark.

The Court: Have you—did you—are you sure the Clerk's Office has your name and address? I mean, that's your responsibility.

Mr. Boyd: Right. That's right. Judge, they had my appearance. I've got a file-stamped copy, which I will also attach with the copy of the Final Pre-Trial Order.

The Court: All right. You should check with the 20th Floor because sometimes there are slip-ups and notices aren't sent to current counsel. That does happen occasionally. And I wouldn't want you to undergo any prejudice because of that. I would like to take a look at your draft. Are you ready for trial, Mr. Boyd?

Mr. Boyd: Judge, we can be ready. When I spoke to Mr. Greenberg, he indicated that Mr. Ryan, I think, would be the one who'd try it. And, Judge, I don't think we could get to it until maybe March.

On February 1, 1989, the Trial Court again denied Petitioner's Motion to Vacate the Court's Order of August 4, 1988.

The Petitioner filed her Motion to Reconsider the Court's Order of February 1, 1989 denying the Petitioner's Motion to Vacate. In said Motion, the Petitioner explained in detail her position with regard to the Court's February 1, 1989 Order. On March 7, 1989, the Trial Court again denied the Petitioner's Motion.

A Dismissal with Prejudice is a harsh sanction which should usually be employed only in extreme sanctions, when there is a clear record of delay or contumacious conduct, or when other less drastic sanctions have proven unavailing. *Ellingsworth v. Chrysler*, 655 F.2d 180; *Boazman v. Economics Laboratory, Inc.*, 537 F.2d 210.

The sanction of dismissal is the most severe sanction that a Court may apply, and its use must be tempered by a careful exercise of judicial discretion. *Durgin v. Graham*, 372 F.2d 130.

In the instant matter, the Petitioner filed three Amended Complaints, argued and prepared two responses to Defendant's Motions to Dismiss, conducted and completed extensive discovery (including oral depositions), and participated in two Pre-Trial Conferences. It is also clear from the record that on the two dates that the Petitioner is said to have missed status dates before the Magistrate, neither the Plaintiff ***nor*** the Defendant was present. This fact clearly buttresses the Petitioner's argument that she was not receiving notices of Status hearings.

Further, the only true delay in this case which can be said to be solely occasioned by the Petitioner is when her lawyer, VINCENT WAGNER, sought leave to withdraw

and new counsel had to be obtained and the trial date reset.

At the time of the dismissal of the instant matter, the case had been pending for almost two years. By August 4th, with the exception of the preparation of the Final Pre-Trial Order, the case was ready to be set for trial. Prior to August 4, 1988, the Petitioner had never failed to appear at a Pre-Trial Conference.

In order to determine whether the Trial Court abused its discretion, the reviewer will examine the procedural history of the case and situation at the time of the dismissal. *Stevens v. Greyhound Lines*, 710 F.2d 1224.

The record in the instant cause does not indicate "a clear record of delay or contumacious conduct" *Boazman v. Economics Laboratory, Inc.*, 537 F.2d 212, that would justify the extreme sanction imposed by the District Court without considering the possibility of less severe sanction, such as imposition of costs. The circumstances here do not reflect a "lack of prosecutive intent" on Petitioner's part. *Beshear v. Weinzapfel*, 474 F.2d 127, 131.

In the instant matter, the case was in a trial posture. Discovery had been taken and closed, Pre-Trial Conferences had been held and both sides indicated when they would be ready for trial. After the Petitioner was told by the Trial Court that she would have to submit the Final Pre-Trial Order to the Court before a Motion to Vacate would be considered, the Petitioner then submitted same. Any delay in submitting said Pre-Trial Order was explained in Petitioner's Motion to Reconsider.

The only Court appearances missed by the Petitioner occurred when ***BOTH*** sides failed to appear.

Although the efforts of the Petitioner to prosecute this case may not have been perfect, they were not so derelict as to warrant dismissal of her lawsuit.

CONCLUSION

For the foregoing reasons, the Petitioner, ALMA RUSSELL, respectfully requests that a Writ of Certiorari issue to the United States Court of Appeals—Seventh Circuit.

Respectfully submitted,

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October, 1990

APPENDIX

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT—WITH ORAL ARGUMENT

Date: July 27, 1990

BEFORE: Honorable John L. Coffey, Circuit Judge
Honorable Kenneth F. Ripple, Circuit Judge
Honorable Jesse E. Eschbach, Senior Circuit Judge

No. 89-1709

ALMA RUSSELL,

Plaintiff-Appellant

v.

JAMES O'GRADY, in his official capacity as Sheriff of Cook County,

Defendant-Appellee

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 86 C 6100, Judge Suzanne Conlon

This cause was heard on the record from the above mentioned district court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the order of this Court entered this date.

[UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 53]

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued June 19, 1990
July 27, 1990

Before

Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*
Hon. JESSE E. ESCHBACH, *Senior Circuit Judge*

ALMA RUSSELL,

Plaintiff-Appellant,

No. 89-1709 *v.*

JAMES O'GRADY, in his official capacity as Sheriff of Cook County,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 C 6100—Suzanne B. Conlon, *Judge.*

ORDER

The district court dismissed Alma Russell's case for want of prosecution. In an attempt to get her case rein-

stated, Ms. Russell filed two motions to vacate and a subsequent motion to reconsider. The district court denied these motions, and Ms. Russell appeals. We affirm.

I

FACTS AND PROCEDURAL HISTORY

On August 8, 1986, Alma Russell through her attorney, Vincent Wagner, filed a complaint naming the Cook County Sheriff's Department and alleging age and race discrimination. Wagner withdrew as counsel, and T. Lee Boyd, Jr., filed his appearance on behalf of Ms. Russell on November 30, 1987. Both parties failed to appear at three status hearings on December 1, 1987, February 2, 1988, and May 17, 1988, before a magistrate to whom the case had been assigned for pretrial proceedings. On March 1, 1988, the case was reassigned to another district judge. At a conference on June 27, 1988, counsel advised the court that he was preparing a fourth amended complaint, and the court directed the parties to submit the final pretrial order at the next conference scheduled for August 4, 1988. Counsel never submitted the amended complaint or final pretrial order and did not appear for the August 4th conference. Noting this failure, as well as counsel's failure to appear at the status hearings, the district court dismissed the cause for want of prosecution.

On September 28, 1988, Ms. Russell filed a motion to vacate the dismissal. The court denied it noting: "A motion to vacate the dismissal order shall not be considered unless plaintiff first presents the pretrial order as directed by the court three months ago." R.71. On January 11, 1989, Ms. Russell filed a second motion to vacate and, two weeks later, submitted the pretrial order. On February 3, 1989, the district court entered an order denying Ms. Russell's second motion to vacate.

On February 10, 1989, Ms. Russell served a motion to reconsider the denial of the second motion to vacate. Because this motion to reconsider was a timely Rule 59(e) motion, the time for appeal of the denial of the motion to vacate, a Rule 60(b) motion, *see Inryco, Inc. v. Metropolitan Eng'g Co.*, 708 F.2d 1225, 1232 (7th Cir.), *cert. denied*, 464 U.S. 937 (1983), did not begin to run until March 8, 1989—the date the order denying the motion to reconsider was entered. Ms. Russell filed her notice of appeal on April 4, 1989. Thus, the denial of the motion to vacate is properly before the court.

II

ANALYSIS

We must decide whether the district court abused its discretion when it denied Ms. Russell's Rule 60(b) motion to vacate the order dismissing her cause for want of prosecution. *See Reinsurance Co. of America v. Administratia Asigurarilor de Stat*, 902 F.2d 1275, 1277 (7th Cir. 1990). Relief under Rule 60(b) is an extraordinary remedy reserved for exceptional circumstances. *See id.* A default or dismissal may be set aside under Rule 60(b) where the moving party acts with reasonable promptness, alleges a meritorious defense or colorable claim and where the default or dismissal is not the result of willful disregard of the court's orders or procedures. *See Inryco*, 708 F.2d at 1229-30 (addressing these considerations in context of default judgment). What constitutes a "reasonable time" for the filing of a Rule 60(b) motion "depends upon the facts of each case, taking into consideration the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and [the consideration of] prejudice [if any] to other parties."

Kagan v. Caterpillar Tractor Co., 795 F.2d 601, 610 (7th Cir. 1986) (quoting *Ashford v. Stewart*, 657 F.2d 1053, 1055 (9th Cir. 1981)).

The district court found that Ms. Russell did not act promptly to vacate the dismissal. It took nearly six months after the dismissal to satisfy the condition that she first file a pretrial order. Even though counsel knew that the pretrial order was due August 4, 1988, he did not prepare the order so that it could be submitted with the first motion to vacate. Upon denial of the first motion to vacate, the court advised Ms. Russell that she would have to submit the pretrial order before it would consider such a motion. This was well within the court's discretion. *See Daniels v. Brennan*, 887 F.2d 783, 789 (7th Cir. 1989) ("[A] district court may impose reasonable conditions for setting aside a dismissal for want of prosecution."). On January 11, 1989, Ms. Russell filed the second motion to vacate, but still did not file the pretrial order. Not until two weeks later, after the court again ordered counsel to submit the order, was it fully submitted. Ms. Russell argues that it took defendant several weeks to assist in the preparation of the pretrial order. However, this consideration does not account for the other five months of delay. In short, this case does not present the exceptional circumstance where it can be said that the course of the litigation was beyond counsel's meaningful control. All counsel had to do was promptly file a motion to vacate and a pretrial order. *See Pyramid Energy, Ltd. v. Heyl & Patterson, Inc.*, 869 F.2d 1058, 1062-63 (7th Cir. 1989) (denial of 60(b) motion was not error where counsel had yet to comply with order to submit pre-trial order).

In arguing the motion to vacate, counsel explained to the district court that he missed the status hearings and

pretrial conference not because of any willful disregard of the court's orders, but because he never received notice that the case had been assigned to a magistrate or of the dates of the hearings or a written confirmation of the June 24, 1988 pretrial conference. In its order, the district court responded that it was counsel's responsibility to notify the clerk's office if copies of orders were not mailed to him, but did not resolve this issue further. Although it would have been preferable for the district court to resolve the issue of notice more definitively, our examination of the record convinces us that this issue was, in any event, not outcome determinative in the district court's decision to deny the motions to vacate. Counsel's failure to file the fourth amended complaint or pretrial order on August 4th (counsel was present at the June 24, 1988 conference and had actual notice that the pretrial order was due in August), and the subsequent delay in filing it in conjunction with either motion to vacate provides sufficient justification for the district court's dismissal and subsequent denial of the motions to vacate.

Counsel also argues that he was involved in another matter on August 4, 1988, and sent an associate in his stead. The district court noted that counsel did not notify the court of the conflict, nor did he request that the conference be rescheduled. Counsel's associate did not appear at the time the conference was scheduled, but rather appeare in chambers sometime later. By then, the conference had been cancelled, and the cause dismissed. Counsel's failure to attend to the plaintiff's litigation due to his involvement in another matter is not excusable neglect. *See Kagan*, 795 F.2d at 609. He has never explained why the pretrial order was not submitted as ordered on August 4, 1988. His actions are examples of the sort of

carelessness that does not provide a ground for relief under Rule 60(b). *See id.* at 607.[1]

III

CONCLUSION

Given our highly deferential standard of review, we cannot conclude that the district court abused its discretion in denying plaintiff's motion to vacate. Accordingly, the order of the district court is affirmed.

AFFIRMED

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[1] In her reply brief, Ms. Russell argues that the district court abused its discretion in considering the merits of the case and, without a hearing, the prejudice to the parties that would be caused by reinstatement. We do not consider matters first raised in the reply brief. *See Wilson v. O'Leary*, 895 F.2d 378, 384 (7th Cir. 1990); *see also United States v. Lewis*, 896 F.2d 246, 249 n.1 (7th Cir. 1990). In any event, on this record, we can find no abuse of discretion on the part of the district court.